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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

PHYLLIS KYLE.

Plaintiff and Appellant,

v.

RAYMOND CLARIDGE et al.,

Defendant and Respondent.

B289504

(Los Angeles County
Super. Ct. No. BC652160)

APPEAL from an order of the Superior Court of Los Angeles County, David Sotello, Judge. Affirmed.

Law Offices of Richard A. Marcus and Richard A. Marcus
for Plaintiff and Appellant.

Luna & Glushon, Robert L. Glushon and Sean M. Bryn for
Defendant and Respondent.

When the relationship between Phyllis Kyle and Raymond Claridge broke up, Ms. Kyle brought suit against Mr. Claridge for breach of alleged contracts to support her and pool their assets. Mr. Claridge responded with a cross-complaint for conversion of his personal property, which he alleged Ms. Kyle prevented him from taking when he left her residence. Ms. Kyle brought an anti-SLAPP motion (Code Civ. Proc., § 425.16) arguing that Mr. Claridge's cross-complaint was based on activity protected by the First Amendment. Specifically, she argued that the cross-complaint did not actually arise out of the conversion of property, but instead arose out of Ms. Kyle's attorney's statements in the course of litigating Ms. Kyle's complaint. The trial court disagreed and denied the motion. We agree with the trial court and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Underlying Facts*

It is undisputed that, while Mr. Claridge was married to another woman, Mr. Claridge and Ms. Kyle entered into a long-term relationship. At some point in the relationship, Mr. Claridge moved into Ms. Kyle's home, which was located on a property which contained a guest house and storage facility in addition to the main residence.

In June 2016, the relationship soured, and Mr. Claridge moved out of the main house and into the guest house. On February 24, 2017, he moved off the property entirely.

The cross-complaint in this case centers on whether Ms. Kyle prevented Mr. Claridge from removing all of his personal items from the property. It is complicated by the fact that Ms. Kyle claims an ownership interest in property Mr. Claridge claims is his alone.

2. *Ms. Kyle's Complaint*

On March 1, 2017, Ms. Kyle filed her so-called *Marvin* complaint. (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 664 [courts enforce express and implied contracts between nonmarital partners].) The operative complaint is Ms. Kyle's first amended complaint, which alleges causes of action for quantum meruit, breach of contract for support, and breach of implied contract to pool assets. In summary, Ms. Kyle takes the position that she and Mr. Claridge were in a romantic relationship from 1984 onward, during which time Ms. Kyle also worked at Mr. Claridge's businesses. During this time, she alleges, Mr. Claridge promised that he would take care of her for the rest of her life, and that they would run the businesses together, sharing any property they acquired as a result. Ms. Kyle named as defendants not only Mr. Claridge, but Mr. Claridge as trustee for the Raymond Claridge Trust and CHP Enterprises. As to the trust, she alleges Mr. Claridge promised her that she was the 90 percent beneficiary. As to CHP Enterprises, she alleges her work improved the value of the business, such that she is entitled to recover \$6,000,000 in quantum meruit.

With respect to personal property, Ms. Kyle alleged that she and Mr. Claridge had agreed to treat nearly everything as joint property, and requested that Mr. Claridge provide an accounting of all joint property over which Mr. Claridge retained possession, custody and control.

The merits of Ms. Kyle's complaint are not before us. We observe only that Mr. Claridge asserts Ms. Kyle was simply an employee with whom he engaged in a long-term romantic relationship. He denies ever promising to take care of her for the

rest of her life, to make her the beneficiary of his trust, to run the businesses with her, or to treat their property as joint.

3. *Mr. Claridge Obtains Leave to File a Cross-Complaint*

After filing their answer, Mr. Claridge, the trust and CHP Enterprises sought leave to file a cross-complaint alleging conversion. The motion was supported by a declaration of Mr. Claridge's counsel explaining that counsel had intended to file a cross-complaint for conversion at the time the answer was filed. However, counsel was recovering from bypass surgery and another attorney from the office had prepared and filed the answer without a cross-complaint. When counsel returned to the office in September, a site inspection of Ms. Kyle's residence was scheduled for October, and counsel thought it possible that the personal property issues could be resolved at the inspection, thereby rendering the cross-complaint unnecessary. At the inspection, only a few items were returned; counsel thereafter sought leave to file the cross-complaint.

The proposed cross-complaint alleged two causes of action: conversion and trespass to chattel. Broadly speaking, the causes of action alleged two things: (1) "When [Mr.] Claridge moved out, [Ms.] Kyle would not allow and prevented [Mr.] Claridge from removing all of his personal property"; and (2) Mr. Claridge had kept financial documents (belonging to himself, the trust, and CHP Enterprises) in locked cabinets in the guest house and storage facility, and at some point in the last three years, Ms. Kyle "broke into the locked cabinets and removed Cross-Complainants' personal records from the locked cabinets."

The trial court granted leave to file the cross-complaint, over Ms. Kyle's opposition.

4. *Ms. Kyle's Anti-SLAPP Motion*

Thereafter, Ms. Kyle filed a motion to strike the cross-complaint under Code of Civil Procedure section 425.16, the so-called anti-SLAPP law.¹

“Anti-SLAPP motions are evaluated through a two-step process. Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims ‘aris[e] from’ protected activity in which the defendant has engaged. [Citations.] If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least ‘minimal merit.’ [Citations.]” (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 (*Park*).)

“Anti-SLAPP motions may only target claims ‘arising from any act of [the defendant] in furtherance of the [defendant’s] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue’ (§ 425.16, subd. (b).) In turn, the Legislature has defined such protected acts in furtherance of speech and petition rights to include a specified range of statements, writings, and conduct in connection with official proceedings and matters of public interest. (*Id.*, subd. (e).)” (*Park, supra*, 2 Cal.5th at p. 1062.)

Here, Ms. Kyle argued that defendants’ cross-complaint arose out of her speech under subdivisions (e)(1) and (e)(2) of the anti-SLAPP statute. Those sections identify as protected activity “(1) any written or oral statement or writing made before a . . . judicial proceeding, or . . . (2) any written or oral statement or

¹ “SLAPP” is an acronym for Strategic Lawsuit Against Public Participation. (*Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 204, fn. 2.)

writing made in connection with an issue under consideration or review by a . . . judicial body” Specifically, Ms. Kyle took the position that the cross-complaint did not arise from her purported pre-litigation conversion of Mr. Claridge’s personal property and theft of the defendants’ financial documents, but instead arose from (1) her attorney’s communication, within the litigation, regarding whether Mr. Claridge could obtain the property; and (2) her own conduct in copying documents in order to respond to Mr. Claridge’s documentary discovery requests within the litigation.

Ms. Kyle supported her anti-SLAPP motion with declarations by herself and her counsel. Ms. Kyle’s declaration explained that, as to the personal property: **“At no time prior to the filing of this lawsuit did I ever once prevent [Mr. Claridge] from taking any items of personal property.”** (Emphasis original.) Instead, she explained, Mr. Claridge was permitted to take everything he wanted when he moved out, and he told her that she could keep or throw away anything he left. Her attorney’s declaration authenticated multiple communications demonstrating that, after Ms. Kyle had filed her *Marvin* action, Ms. Kyle’s counsel gave Mr. Claridge a “formal notice” that Ms. Kyle was claiming a 1/2 ownership interest in any personal property Mr. Claridge acquired during their relationship, and made a “formal demand” that he stop removing any personal items which belonged to Ms. Kyle. There followed an exchange of letters between counsel for Ms. Kyle and counsel for Mr. Claridge attempting to resolve the ownership of at least some items of property which each party claimed as his or her separate property. Relying on these communications, and Ms. Kyle’s absolute denial that she prevented Mr. Claridge from

removing any of his property pre-litigation, Ms. Kyle argued that the cross-complaint must have arisen not from any pre-litigation conversion (because, according to her, none occurred) and instead arose from the protected activity of her attorney's mid-litigation exchange of letters regarding the disputed property.

Ms. Kyle submitted similar evidence regarding defendants' allegations that she took financial documents from locked cabinets. She submitted her own declaration that "At no time did [Mr. Claridge] ever keep any financial documents under lock and key that were kept from me." To the contrary, she explained that the documents had been left in her home in unlocked cabinets, and she simply copied them and gave them to counsel in order to respond to Mr. Claridge's discovery requests. Therefore, she took the position that the allegations in the cross-complaint must not have arisen from any pre-litigation theft of documents from locked cabinets (because, again, she claimed that none occurred) and instead arose from her mid-litigation response to discovery.

5. *Defendants' Opposition*

In opposition, defendants explained that the cross-complaint meant what it said, and that it did, in fact, arise from Ms. Kyle's alleged pre-litigation retention of Mr. Claridge's personal property and theft of defendants' documents from locked cabinets.

The opposition was supported by a declaration of Mr. Claridge which explained that he began to move out of the shared residence on February 24, 2017, but before he removed all of his property, Ms. Kyle stopped him. Specifically, Mr. Claridge stated that he had only been able to remove some of his belonging from the guest house and storage facility, but that Ms. Kyle had prevented him from retrieving any of his property from the main

residence.² As to the documents, Mr. Claridge explained that he had never given copies to Ms. Kyle, but instead kept them in locked cabinets in the guest house, and Ms. Kyle did not have a key or permission to access them. He further explained that he took all the documents with him when he left the premises. When Ms. Kyle submitted copies of these documents in response to his discovery requests, Mr. Claridge inferred that she had previously stolen them from their locked locations, as there was no way they would have been in her possession at that time unless she had stolen them earlier and made copies.

6. *Hearing, Ruling and Appeal*

The motion was argued, although there was no court reporter present at the hearing. The court took the matter under submission, and later issued its ruling denying Ms. Kyle's anti-SLAPP motion. The court concluded that Ms. Kyle failed to establish that the cross-complaint arose from activity protected by the anti-SLAPP statute. Specifically, the court explained, "the activity sued upon was not [Ms.] Kyle's filing the Marvin action or any other communicative act made before or in connection with the Marvin action within section 425.16's meaning: it was the simpl[e] act of retaining personal property." Similarly, as to the documents, the court found the cross-complaint arose not from Ms. Kyle's response to discovery, but from her breaking into locked cabinets.

Ms. Kyle filed a timely notice of appeal.

² He specifically noted that, although he had been reunited with some of his possessions at the October site inspection, Ms. Kyle had deprived him of these obvious separate property items – including clothes and photos of his parents – since February. In his opposition, he argued that return of this property did not undermine his right to damages for its temporary conversion.

DISCUSSION

On appeal, Ms. Kyle argues the trial court erred in denying her anti-SLAPP motion. Specifically, she argues that the trial court failed in its duty to consider the declarations she and her counsel submitted in support of her motion, reasoning that if the court had considered the declarations, it would have concluded the cross-complaint was based on communications she and her attorney made in the course of pursuing her *Marvin* action.

1. *Standard of Review*

“We review de novo the grant or denial of an anti-SLAPP motion. [Citation.] We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. [Citations.] In addition to the pleadings, we may consider affidavits concerning the facts upon which liability is based. [Citations.] We do not, however, weigh the evidence, but accept plaintiff’s submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law. [Citation.]” (*Park, supra*, 2 Cal.5th at p. 1067.) We observe that in the rule cited above, the “plaintiffs” are Mr. Claridge and his fellow cross-complainants (hereafter, Mr. Claridge) and the “defendant” is cross-defendant Ms. Kyle. In other words, we accept Mr. Claridge’s submissions as true and consider only whether Ms. Kyle has established her entitlement to prevail as a matter of law.

2. *The Absence of a Reporter’s Transcript is Not Fatal*

Because we review the denial of an anti-SLAPP motion de novo, and there is no indication that any testimony or other evidence was introduced at the hearing, we can resolve the

appeal in the absence of a reporter's transcript.³ "While a record of the hearing would have been helpful to understand the trial court's reasoning, it is not necessary here where our review is de novo and the appellate record includes the trial court's written orders and all the evidentiary materials germane to Appellants' motion. [Citation.]" (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 933-934; *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 696.)

3. *The Cross-Complaint Did Not Arise Out of Protected Activity and the Motion Was Properly Denied*

As discussed above, the issue in the first step of the anti-SLAPP analysis is whether the conduct challenged in the pleading arises from any act of the defendant in furtherance of his or her right of petition or free speech. Here, Ms. Kyle argues that Mr. Claridge's cross-complaint arises out of her, and her counsel's, statements in the pursuit of her *Marvin* action as well as their responses to discovery therein. The issue before us is simply whether Mr. Claridge's cross-complaint arises from protected litigation activity, or whether it arises from unprotected pre-litigation conversion.

³ Because our review is de novo, it is also unnecessary for us to further address Ms. Kyle's contention that the trial court failed to consider the declarations she submitted in support of her motion. We note, however, that we would be hesitant to consider such an argument in the absence of a reporter's transcript, where, as here: (1) the contention that the trial court failed to consider the evidence is based on nothing more than counsel's inference that if the evidence had been considered, a different result would have obtained; and (2) a reporter's transcript of the hearing likely would have documented whether the court considered the evidence.

“A claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citation.] Critically, ‘the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech.’ [Citations.] ‘[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.’ [Citations.] Instead, the focus is on determining what ‘the defendant’s activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.’ [Citation, italics omitted.] ‘The only means specified in section 425.16 by which a moving defendant can satisfy the [“arising from”] requirement is to demonstrate that *the defendant’s conduct by which plaintiff claims to have been injured* falls within one of the four categories described in subdivision (e)’ [Citation, italics added.] In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability.” (*Park, supra*, 2 Cal.5th at pp. 1062-1063.)

“ ‘ “Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion are the plaintiff’s ownership or right to possession of the property at the time of the conversion; the defendant’s conversion by a wrongful act or disposition of property rights; and damages.” ’ [Citation.]” (*Greka Integrated, Inc. v. Lowrey* (2005) 133 Cal.App.4th 1572, 1581.) The conduct on which Mr. Claridge relies in his conversion cross-complaint is (1) Ms. Kyle’s alleged acts in refusing to allow him to remove all of his property when he left the residence before she filed her *Marvin* action; and (2) Ms.

Kyle's alleged acts in breaking into his locked cabinets and copying his private documents while he still lived at the premises, also before she filed her *Marvin* action. These acts, if true, are simple tortious conduct, and do not implicate Ms. Kyle's rights of speech or petition.

Ms. Kyle has three arguments against this result. None are meritorious.⁴

First, Ms. Kyle relies on her absolute denial of these acts in her declarations, to argue that since she did not do these things, Mr. Claridge's cross-complaint must be based on other, protected, conduct in which she did engage. But Ms. Kyle's denials are not dispositive; indeed, we must accept Mr. Claridge's submissions as true and consider only whether Ms. Kyle's evidence establishes her right to prevail as a matter of law. There is a simple dispute of fact: Mr. Claridge claims Ms. Kyle prevented him from removing his belongings and stole his documents; Ms. Kyle disagrees. Faced with this conflict, we must side, for now, with Mr. Claridge.⁵

Second, Ms. Kyle points out that Mr. Claridge conceded that the dispute over the financial documents only arose when she responded to Mr. Claridge's discovery requests. She argues that this proves the dispute was, in fact, based on her response to discovery. Here, Ms. Kyle confuses the act complained of

⁴ Ms. Kyle's arguments are either frivolous or border on the frivolous. However, Mr. Claridge does not ask for sanctions, so we address the point no further.

⁵ Ms. Kyle may win the day at trial, but this would only establish that she *did not* convert Mr. Claridge's property. It would not establish that Mr. Claridge's cross-complaint was based on something other than the alleged conversion.

(stealing the documents from locked cabinets when Mr. Claridge lived on the premises) and a communication following the challenged act (the discovery response containing copies of the documents). As our Supreme Court has explained, “a claim is not subject to a motion to strike simply because it contests an action . . . that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability” (*Park, supra*, 2 Cal.5th at p. 1060.) Here, the wrong complained of is the theft of documents, not the discovery response by which the theft was discovered.

Third, Ms. Kyle relies on case law in which a lawsuit for conversion was shown to be based on protected litigation activity. (See *Finton Construction, Inc. v. Bidna & Keys, APLC, supra*, 238 Cal.App.4th at pp. 204, 210 [defendant attorneys sued for conversion and receipt of stolen property in connection with materials they were given which were pertinent to a pending case they were litigating]; *Greka Integrated, Inc. v. Lowrey, supra*, 133 Cal.App.4th at pp. 1579-1580 [defendant sued for conversion and breach of a nondisclosure agreement, but the affidavits revealed that the conduct complained of was actually the protected conduct of using those documents in the course of litigation and turning them over to government officials]; *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 297-298, 308 [terminated in-house counsel preparing to sue for wrongful termination was sued for disclosing allegedly confidential information to her own wrongful termination attorney].) These cases are distinguishable. Ms. Kyle was not sued for litigation activity, she was sued for wrongfully retaining

Mr. Claridge's possessions when he moved out after a breakup, and for surreptitiously copying his private documents when he lived in her home.

In sum, Ms. Kyle cannot fit the "square peg" of a garden-variety conversion action into the "round hole" of protected litigation activity by means of a disputed, albeit creative, declaration. She has failed to meet her burden on the first prong of an anti-SLAPP motion. The motion was properly denied.

DISPOSITION

The order is affirmed. Ms. Kyle is to pay Mr. Claridge's costs on appeal.

RUBIN, P. J.

WE CONCUR:

MOOR, J.

KIM, J.